12/20/76

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In re	)	
	)	I. F. & R. Docket No.
Water Services, Inc.,	)	IV-167-C
	)	
Respondent	)	Initial Decision

Preliminary Statement

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 l(a), 1973 Supp.], instituted by a complaint issued December 24, 1975 by the Director, Enforcement Division, Environmental Protection Agency, Region IV, Atlanta, Georgia. The complaint charges that respondent, Water Services, Inc., was holding for sale the product "BAF-100" on July 30, 1975, and that said product was a pesticide was in the meaning of 7UFC136(u), and that such pesticide was adulterated in that its strength or purity fell below the professed standard or quality under which it was sold. The complaint proposed a penalty of $990 for the violation charged in the complaint. On March 30, 1976, respondent filed an answer to the complaint in which it denied that the product BAF-100 was being held for sale or that it was packaged, labeled and released for shipment.

After the submission of pre-hearing materials pursuant to Section 168.36(e) of the Rules of Practice [39 F.R. 27656, 27663], and a pre-hearing conference held on October 28, 1976, an oral hearing was held in Knoxville, Tennessee on October 28, 1976, before Thomas B. Yost, Administrative Law Judge, Environmental Protection Agency. At the hearing, respondent was represented by William R. O'Neal, Knoxville, Tennessee, and complainant was represented by Bruce R. Granoff, Legal Support Branch, Environmental Protection Agency, Atlanta, Georgia. Two witnesses testified on behalf of complainant and complainant introduced four exhibits into evidence on behalf of complainant. Four witnesses testified for respondent and two exhibits were received into evidence on behalf of respondent. In addition, a stipulation was entered into by the parties and was received into evidence. After the hearing, the parties filed briefs.

Findings of Fact

1. The respondent, Water Services, Inc., is a corporation which maintains its home office and place of business in Knoxville, Tennessee.

2. On or about July 30, 1975, Water Services, Inc., was inspected by EPA Consumer Safety Officers, Ben Woods and William J. Pfister. A container which bore the label "BAF-100" which had previously been shipped from the warehouse in Knoxville to a customer in Virginia and then returned was sampled, along with a sample of another item which is not an issue in this case. The form with the label "BAF-100" also bore Registration No. 10867-5, dated 7-31-73. The sample taken by the EPA Consumer Safety Officers was identified as Sample No. 110999.

3. The product BAF-100 having been analyzed by accepted procedures was found to be deficient in chloride in that the produce was represented to contain .322% total chlorides, when, in fact, the test revealed the produce contained only .227% total chlorides representing a deficiency of 29%.

4. The respondent had gross sales for 1974 in excess of $400,000 but less than $700,000, and where the adulteration alledged in this complaint would not result in adverse effects, the appropriate penalty assessed was $990.

Discussion

The stipulation in this matter executed between the complainant and the respondent disposes of most of the facts in this case concerning such matters as when the sample was obtained, whether the analysis was accurate, and the identification of the sample by product name and EPA registration number. In addition, the companies gross sales and the appropriateness of the amount of the penalty, if ultimately assessed, was also stipulated between the parties.

The only fact in dispute in this case is whether or not the produce sampled and found to be deficient was, in fact, packaged, labeled, and released for shipment as alledged in the complaint, or whether the product sampled was sitting in a storage area and was not, in fact, released for shipment or distribution for sale. The testimony in this case reveals that on the date of the inspection visit to the respondent's premises in Knoxville, Mr. Ferris, the president of the company, was not available and the inspectors, Mr. Ben Woods and Mr. William J. Pfister, were directed to Mr. Owen B. Loomis. Mr. Loomis, the record shows, had at one time been the plant superintendent, but at the time of the inspection visit was not occupying that position, but was the plant engineer. Mr. Loomis was familiar with the procedures involved with EPA inspections, in as much as he was acting as the plant superintendent on a previous inspection visit by Mr. Pfister.

Mr. Pfister testified that he advised Mr. Loomis that he was there to inspect algaecides and fungicides and that Mr. Loomis directed him to a storage area on the premises which contained numerous drums of products, only two of which had any label on them. These two products being BAF-100 and Algaecide X-20. Samples of both of these products were obtained and Mr. Loomis signed a receipt for samples which acknowledgement stated that the samples were packaged, labeled and released for shipment, or having been shipped, were being held for distribution or sale. Since these products had been returned to the respondent by a previous purchaser, both Mr. Pfister and Mr. Loomis were concerned about their status and, therefore, an additional notation was made on the receipt for samples which stated,

> "The above samples were acknowledged by Mr. Brooks Loomis as being packaged, labeled and released for shipment. However, before shipment of these pesticides to consignees, the container or drums will be further labeled with the company label with the date of shipment, including the net weight, address of the consignee and its EPA establishment number."

The testimony of the witnesses was that no other area of the respondents' premises were examined for purposes of obtaining samples and that the two samples taken and referred to in the receipt for samples were the only two products sampled on the occasion of this visit.

Both Mr. Woods and Mr. Pfister testified that they expressly advised Mr. Loomis at the time of their visit that the only products they were interested in sampling, or, in fact, could legally be concerned with, were those which were actually packaged, labeled and released for shipment. Mr. Loomis testified that he did not recall the conversation, and that if he had been so advised by the inspectors, the only place he could have taken them was the shipping-dock area of the facility which contains materials actually labeled and held for pick-up by a commercial carrier.

Mr. Ferris, the president and owner of the corporation, testified that the product, which is the subject of this hearing, was not packaged, labeled and released for shipment. He testified that it is the policy, practice and procedure of his company that whenever materials are returned from a purchaser for any reason, prior to re-shipment or re-sale of that material, it is first sent to the laboratory for analysis to see that it still conforms to the label requirements in terms of strength and purity and that if it does so conform, it is normally put in with a larger batch, and drummed and packaged for later shipment to another customer. Mr. Ferris also testified that on occasion, products having been returned from customers are found to have been diluted by water or other contaminants. In the case of this sample, which weighed substantially less that the weight indicated on the label, company policy would require that the drum be brought up to full weight before shipping, in as much as they do not ship materials in

less than full-drum lots since their bookkeeping and pricing practices are based on full drums and not partially full drums. The record also indicates that the sampled material was returned to the respondent by the original purchaser on January 25, 1974, and that the inspection took place on July 30, 1975 approximately one and a half years after its return to the respondent.

Mr. Chance, the foreman of the liquid mix department of Water Services, Inc., testified that in all cases where materials are returned to the company by a former purchaser, a sample of the returned product is immediately taken to the laboratory for analysis, and if it is determined that the product is adulterated or unfit for a subsequent resale, the material is disposed of. If the material is capable of being returned to specifications, that is normally done by placing the returned product in the next batch made of that product and brought up to specifications, re-drummed, and released for shipment along with other portions of that particular batch.

The laboratory technician who operates and supervises the laboratory analysis for Water Services, Inc., also testified that the practice of the company was to immediately test all returned products to detemine whether or not they are capable of being returned to specifications and then sold or disposed of as the case may be.

None of the witnesses for the respondent were able to explain why this particular drum of returned product was not subjected to analysis and either disposed of or re-sold as is the normal practice. In this case, the material stayed in the warehouse area for some one and a half years without having been subjected to any analysis. It was pointed out that during this period, from 1974 to 1975, there had been some changes in company personnel and that at least two plant superintendents had been employed and discharged during this period of time. Mr. Chance, the liquid products foreman, testified that during the period in question being January 1974, the time of the product's return to the company, and July 1975, the date of the inspection and sample taking, dozens of batches of product BAF-100 had been formulated and sold.

Therefore, this case turns on the question of fact as to whether or not this product was packaged, labeled and released for shipment, or through over-sight or neglect had been sitting in the warehouse area unsampled and unanalyzed and, thus, not released for shipment or sale according to the policies and practices of the respondent company.

The Agency based its case upon the fact that Mr. Loomis, who signed the receipt for samples, indicated that except for further labeling and adjustments in the net weight and the placing of an address of customer or consignee label on the drum, the product sampled was packaged, labeled and released for shipment. The respondent company on the other hand, states that the product could in no way be considered as being ready for shipment or sale in as much as it had not been analyzed for purity and that in any

event the drum would not be shipped in its present condition since it did not contain a full quantity of the product, but rather was only a partially-filled drum which the company does not ship. Although the receipt for samples and the inspection notice indicates that at the time of the visit and sample taking, Mr. Loomis was given the title of plant manager, he was not, in fact, employed by the respondent company in that capacity at the time of the inspection, but was rather the plant engineer whose duties involve the maintenance of rolling stock of the company and the assembly and construction of various mechanical pumps which the respondent corporation also markets.

The complainant, based on the record in this proceeding as of the time the complaint was issued, had, in my opinion, made out a prima facie case against the respondent company. However, that prima facie case is subject to rebuttal by the introduction of evidence on the part of the respondent, which evidence was aduced in the oral hearing had on this matter.

The complainant based its position on the fact that Mr. Brooks Loomis, who was acting on the behalf of the respondent corporation on the day of inspection, signed the receipt for samples which has printed material on it indicating that the samples obtained were packaged, labeled and released for shipment. Due to the unusual facts of this case, additional language was written into the receipt for samples by inspector Ben Woods in cooperation with Mr. Loomis which further elaborated on the status of the samples as indicated above. In support of its position, the Agency argues that the respondent has estopped from denying the authority of Mr. Loomis to sign the receipt or act on the behalf of the corporation. I am, of course, familiar with the theory of master and servant or principal and agent, and I do not believe the record in this case indicated that the respondent argued that Mr. Loomis was not properly acting on the behalf of the corporation when he showed the inspectors through the facility or directed them to the area where the samples were ultimately taken. I do not believe, however, that the theory of principal and agent stands for the proposition that an agent who makes a statement which is contrary to fact binds his principal to the acceptance of that statement when all evidence points to a contrary conclusion. Although Mr. Loomis, at the hearing denied that the inspectors advised him that they only wanted to inspect pesticides or algaecides which were labeled, packaged and released for shipment, it is more likely that such statements were made to Mr. Loomis, but that he did not perceive their importance nor understand the significance of what the inspectors were telling him. It was obvious from the testimony of Mr. Loomis at the hearing that he had no idea of the legal significance of the phrase "held for sale." In his opinion, that phrase meant only products that had actually been sold and were labeled with the shipping label to the purchaser and sitting on the loading dock of the facility.

Obviously, Mr. Loomis' conception of that phrase is far narrower than that which the law and case decisions place on such phrase. Having observed Mr. Loomis' conduct on the witness stand and his general demeanor, I am of the opinion that he would have signed practically anything placed before him by two Federal inspectors and, in the instant case, did precisely that.

This conclusion is borne out by several facts. At two places on the receipt for samples, Mr. Loomis' title was described as that of plant manager, and Mr. Loomis was not plant manager at the time of the inspection, had never been plant manager, since the corporation does not use that term in describing its chief operating officer, but, rather, uses the term plant superintendent. Mr. Loomis raised no question about the fact that the receipt described him as plant manager. I'm also satisfied that it is quite likely that the inspectors did, in fact, discuss the status of the samples with Mr. Loomis, and that Mr. Loomis and inspector Ben Woods did work out the language which appears in hand-printed form on the receipt for samples, but that Mr. Loomis did not understand the importance or significance of what he was signing.

Counsel for the complainant has called the Court's attention to several pesticide decisions issued by other administrative law judges of the Environmental Protection Agency. One of the cases cited is Chemola Corporation, I. F. & R. Docket No. VI-21C. That case involved a sample of a weed killer obtained from the premises of the respondent corporation, which upon analysis showed to be substantially deficient in the active ingredient. The product in question is sold in concentrated form and, prior to use, is to be diluted approximately 4-to-1. The EPA laboratory upon receiving the sample, diluted the material in conformance with the label instructions and found the product substantially under strength. The corporation, as a defense, argued that the sample actually taken was a saleman's sample which had already been diluted 4-to-1, and when the EPA laboratory further subjected the sample to dilution, such dilution resulted in the 16-to-1 reduction in strength, as opposed to 4-to-1. The administrative law judge in that case found that the respondent's contentions were not substantiated by the record for a variety of reasons, not the least of which is that the witness for the respondent stated that, "I fully expected to give them and did feel assured that I had given them a sample of the material that represented what was sold." Additionally, the witnesses for the respondent testified that he considered it "possible and even probable that the sample could have been a diluted sample and that it could well be the diluted variety." I feel that the Chemola case is distinguishable from the case at hand, in that in this case it is the undisputed testimony of all of the respondent's witnesses that it is the practice of that corporation to subject returned merchandise to additional analysis to determine if the product is still up to reported strength and, that if it is not, to attempt to return it to proper constituents prior to re-sale or to dispose of the product, as the case may be. In the Chemola case, the witness for the respondent could only hypothesize that the sample analyzed by EPA was one that was diluted for use of salesmen and did not, in fact, represent the product in the condition under which it is normally sold. Further, in Chemola, there is no indication that the batch from

which the sample was taken was in any way suspect or had any distinguishing features which would have caused the respondent corporation to be on the notice that the product should not be sold in the form in which it was found or that it should have been subjected to additional treatment prior to being released for sale to customers.

In the case of, In re: Associated Chemists, Inc., I. F. & R. Docket No. X-17C, products obtained and sampled were found to be substantially deficient in certain active ingredients. Again, as in the instant case, the respondent corporation's officer signed the receipt for samples which indicated that the sample taken by the inspectors was packaged, labeled and released for shipment or being held for distribution or sale. In the Associated Chemists' case, the respondent's defense was that an employee had scotch-taped a hand-written note on top of the shipping container which indicated that the contents were not for sale. In the Associated Chemists' case, however, there was no evidence presented to support or substantiate the respondents' allegation that a hand-written note was, in fact, on top of the shipping container and that none of the EPA inspectors observed or saw the note alledgedly on top of the shipping carton, although they were in close proximity thereto and observed the respondent take the sample from the carton. That case is distinguishable from the case at hand, in as much as the decision to hold the products subject to the provisions of the law and the penalties attached, thereto, was based strictly upon a question of evidence which the administrative law judge found did not support respondent's contention.

In the case of Elco Manufacturing Company, I. F. & R. Docket No. III-33C, the violation was that the products were mis-labeled. The defense of Elco, in that case, was that the labels on the samples taken were merely for "tagging purposes" and were not the labels placed on deliveries when sales were made, and that the proper, registered label is placed on all containers prior to sale and delivery. In the Elco case, however, Mr. Katz, who was the officer in charge at the time of the inspection, knew precisely what the purpose of the inspection was and was knowledgable and had a complete understanding of what the terms "held for sale" meant in that on other samples taken contemporaneously, Mr. Katz insisted on writing on the receipts as to those samples the phrase "not for sale," but he did not make this notation in regard to the samples which were later found to be improperly labeled. Further the reaction of Mr. Katz to the return visit of the inspectors indicated that he fully accepted the concept that the violation alledged did occur. For that reason, the Elco case is not on point with the case now under discussion.

In concluding that the sampled product in this case was not, in fact, held for sale, several factors appear to me to be determinative. First, there was unanimity among the respondent witnesses as to the policy and practice of that company as it pertains to the treatment normally accorded to products returned by customers prior to the re-sale of such products.

Secondly, the fact that as of the time of the inspection and for a substantial period preceding the inspection, there had been a turnover in personnel at the facility in the position of plant superintendent. From the time the product was returned to the company until the date of the inspection, several plant superintendents had been employed and discharged, and no person occupied that position at the time of the inspection which accounts for the failure to identify this returned product and subject it to the procedures normally accomplished by the respondent company. Thirdly, the fact that the product sat in the staging or warehouse portion of respondent's facility for approximately one and a half years without having been sold during a period when large quantities of the product in question, BAF-100, was formulated, drummed and sold by the company, indicating that if the product sampled were, in fact, being held for sale, it would have been sold along with the other like products of that company in the one and a half year time period.

Although the respondent corporation is certainly guilty of negligent and, perhaps, slip-shod behavior in regard to this sampled product, I am of the opinion that such negligence cannot change the factual and legal character of a product as urged by complainant. Logic and common sense would, in my judgement, substantiate the defense offered by the respondent that the product would not be sold in the form in which it was sampled and analyzed by the complainant, but rather have been subjected to laboratory analysis and, having determined that it was deficient, would have been brought up to strength and mixed with the next batch of such product manufactured by the respondent and later sold in proper chemical strength.

Conclusion

Based on the record in its entirety, I am of the opinion that the product in question, BAF-100, was not, in fact, packaged, labeled and released for shipment at the time the sample was taken from the drum in question, but that the product through neglect, oversight or otherwise was in the warehouse or staging area of the plant premises and had been there for approximately one and a half years unattended and unnoticed by the respondent personnel and would not have been released for shipment or sale in its present condition without having first been subjected to the analysis, re-drumming and other procedures indicated by the respondent company as constituting its practices concerning returned products.

Since the product was not packaged, labeled and released for shipment, its condition and chemical make-up is immaterial for purposes of this proceeding.

Having considered the entire record, and based on the findings of fact and discussions and conclusions, herein, it is proposed that the following order be issued.

Final Order

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 l(a) (1)], no violation has been established on the basis of the complaint issued on December 24, 1975. The complaint is dismissed.

DATED: December 20, 1976

T. B. Yost

Thomas B. Yost
Administrative Law Judge

Unless appeal is taken by the filing of exceptions pursuant to Section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. [See Section 168.46(c).]